Filed 12/14/01

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROGELIO LOPEZ, Defendant and Appellant.	A093945 (Mendocino County Super. Ct. No. 0038670)

Rogelio Lopez appeals his conviction of simple battery, and misdemeanor contempt of court in violation of Penal Code section 273.6.[1] The court stayed, pending this appeal, appellant's sentence of 36 months probation, with 90 days in county jail, 75 hours of community service, and a restitution fine of $100.

We shall affirm the judgment.

FACTS[2]

Appellant, his brother, Jessica H. and Shawna P. all worked at a Burger King in Willits. After complaints from Shawna, and another female employee that appellant had subjected them to unwelcome sexual advances, Esau Martinez talked to appellant, on three occasions, about his behavior. Chris Cresswell, the head manager, also spoke twice to appellant and his brother, on the same subject.

On May 24, 2000, Jessica, Shawna, and appellant's brother were closing the restaurant. Jessica asked appellant if he could help her clean the restroom because it was

[1] Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

11:30 p.m., and her work permit did not allow her to work past midnight. Appellant agreed, but when they entered the restroom he began kissing her, and when she stepped backwards away from him, he pushed her into a corner, between the restroom door, and a stall door. He pulled her tank top outward and complimented her on her bra, kissed her neck and chest, removed her breasts from her bra, rubbed his hands all over her body, and unbuttoned and pulled her pants down. Throughout, Jessica repeatedly asked him to stop, and was able to pull her pants up. Appellant pulled them down again, and put his hand inside her underwear, and touched her vagina.

In the meantime, Shawna, who had been working in her office, asked appellant's brother where Jessica was because Jessica usually told Shawna when she was going to clean the restroom. When she learned that appellant was cleaning the restroom with Jessica, she went out the kitchen door towards the bathroom and appellant's brother followed. As they walked through the door, appellant's brother gave a loud whistle, and slammed the door behind them.

Jessica heard the door slam, and appellant grabbed the trash and ran out the door. Jessica locked herself into a stall and cried. Shawna saw appellant come out of the restroom, and appellant said he was just getting cleaning supplies. Later, Shawna went into the restroom, saw that Jessica was shaking, and thought she had been crying. Shawna helped her finish cleaning, but Jessica said nothing. The next day, Jessica told her boyfriend, and her parents, what happened and reported the incident to the police. Appellant and his brother were fired.

At the suggestion of the police, Jessica obtained an emergency protective order, and on June 23, 2000, she appeared in court for a hearing that resulted in issuance of a restraining order, effective for three years. Appellant was present in court with an interpreter. The restraining order stated that appellant must stay at least 100 yards away from Jessica, her residence, place of work, and school. In July, appellant and his brother

---

[2] The jury acquitted appellant of misdemeanor sexual battery, and other counts with respect to Shawna P. We do not summarize the facts underlying these counts because

appeared in the doorway of the Burger King where Jessica worked. He stood in the doorway, looking at Jessica, and laughing. Nannette Sleeker also saw appellant standing in the doorway, looking at Jessica, and laughing. She saw Jessica turn and run. Cresswell had shown Sleeker the restraining order, and told her to call the police if appellant came into the restaurant. As instructed, she called the police, but appellant left before they arrived. Brent Schrage also saw appellant standing in the doorway, after Jessica ran to him, and told him appellant was there. Appellant stayed for about a minute after Schrage first saw him, but left when he noticed that some employees were on the telephone, calling the police. Brent testified that "It was kind of a taunt, basically."

ANALYSIS

I.

Sua Sponte Duty to Give CALJIC No. 17.01

Appellant testified that he only came into the bathroom to get some cleanser, and that he did not touch Jessica at all. The jury acquitted appellant of assault with intent to commit rape, and of felony sexual battery by restraint, but convicted him of the lesser included offense of simple battery.

Appellant contends that the conviction on this lesser included offense must be reversed because Jessica testified to multiple acts of unconsented touching that might have formed the basis for his conviction, and the court failed, sua sponte, to instruct the jury pursuant to CALJIC No.17.01.

"When the evidence tends to show a larger number of distinct criminal acts than have been charged, the prosecution must, upon defense request, select the specific acts upon which it will rely for each allegation; [and] if there is no request for an election, the court must instruct the jury so as to ensure unanimity." (*People v. Salvato* (1991) 234 Cal.App.3d 872, 879.) The court, however, has no duty to give a unanimity instruction when, " '*the acts are so closely connected that they form part of one and the same*

---

they are not relevant to any other the issues on appeal.

transaction [or] when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time.' " (*Id.* at p. 882.)

Jessica testified to a single episode that occurred in the bathroom, during which appellant put his hands all over her body and clothing without her consent. These acts were "so closely connected in time" that they constituted a single transaction. (See *People v. Mota* (1981) 115 Cal.App.3d 227 [unanimity instruction not required when repeated acts of penetration occurred as part of a single attack, committed over the course of one hour]; *People v. Robbins* (1989) 209 Cal.App.3d 261, 266 [no unanimity instruction required on enhancement for infliction of great bodily injury during sexual assault where attack involved was "one prolonged assault, of which individual blows and other indignities were inseparable components."] Nor did appellant's defense depend upon distinguishing between each unconsented touching, because his defense was that he did not touch her at all. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 851 [continuous crime exception to requirement that unanimity instruction be given applies when "the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them"].) Therefore, the court did not err by failing to give a unanimity instruction.

II.

Sufficiency of Evidence of Contempt of Court Order

Appellant testified that he knew that he was supposed to stay away from Jessica, but was unaware that he had to stay away from her place of work. He acknowledged that he was present at the hearing where the restraining order issued, and had an interpreter. At that hearing, the judge asked if he would accept a three-year restraining order to stay away from Jessica, and he was given a piece of paper, but the judge did not read it to him. The judge did explain that the order restrained appellant from going near Jessica, but the judge did not tell appellant that he was to stay away from the Burger King. Appellant further testified that he, his brother, and some friends, decided to get some food at Burger King, and when he saw that Jessica was there, he told his brother to order take out. Appellant then left and waited for him at a nearby gas station. Based upon the foregoing,

appellant contends that there is insufficient evidence to support the misdemeanor conviction of violation of a restraining order, because there is no evidence that he knew of the term that he stay away from Jessica's *place of work*, and when he saw that she was there, knowing that he was to stay at least 100 yards away from her, he immediately left.

Appellant's argument fails because it depends largely upon crediting his own testimony, and adopting an interpretation of the evidence that is contrary to the judgment. As the reviewing court, we cannot reweigh the evidence, and must draw all inferences and resolve all conflicts in favor of the judgment. (*People v. Perez* (1992) 2 Cal.4th 1117, 1127; *People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.)

The absence of a proof of service on the restraining order submitted as an exhibit at trial does not preclude the inference, from other evidence, that appellant had *actual knowledge* of its terms. (See *In re Imperial Ins. Co* (1984) 157 Cal.App.3d 290, 300 [failure to serve an order does not preclude enforcement against a party having actual knowledge of the order].) Appellant admitted that he was present in court when the order was made, and that he was, at that time, given a "piece of paper." The order itself clearly specifies that appellant must stay at least 100 yards away from Jessica, her place of work, her home, and her school. The jury could have inferred from this evidence that appellant knew of the terms of the order, and simply discredited appellant's testimony that he did not understand that the order also prevented him from entering the Burger King where Jessica worked.

In any event, appellant admitted that he knew that he was not to go within 100 yards of Jessica, wherever she might be. He knew that Jessica had been working at the Burger King, and, in the absence of some evidence that he knew she no longer worked there, the jury could infer that, at a minimum, he knew he was risking violating this term of the restraining order, by going to the Burger King to get takeout food. The jury also apparently did not credit appellant's testimony that, when he saw Jessica, he immediately left. Instead, it credited the testimony of other witnesses that he stood in the door, looking at Jessica, and laughing, and left when he realized that the police were being

called. Based upon the foregoing evidence, a reasonable trier of fact could conclude that appellant violated section 273.6.

III.

Instructions on Violation of Section 273.6

Appellant also contends that the court erred by giving instructions on general intent with respect to section 273.6, which proscribes "[a]ny intentional and knowing violation of a protective order. . . ."[3] He argues that the substitution of the term "intentional" for "willful" in 1994 amendments to section 273.6, subdivision (a) (see Stats. 1993-94, 1st Ex. Sess., ch. 29 (A.B. 68) § 3.5) evinced a legislative intent to change the offense from a general, to a specific intent crime.

The terms general and specific intent have been " 'notoriously difficult . . . to define and apply.' " (*People v. Rathert* (2000) 24 Cal.4th 200, 205.) Nevertheless, in *People v. Hood* (1969) 1 Cal.3d 444 the court explained: "When the definition of a crime consists of only the description of a particular act, without reference to an intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (*Id.* at pp. 456-457.)

We find no basis, in the plain language of the statute, based upon the substitution of the word "intentional" in the 1994 amendments to section 273.6 to support the

[3] The instruction given was prepared by the prosecutor, and modified by the court to include standard instructions defining "willfully" and "knowingly, without objection from appellant's counsel: It stated, in pertinent part: "Every person who willfully and knowingly violates a court order obtained pursuant to 527.6 of the Code of Civil Procedure of the State of California is guilty of a violation of Penal Code section 273.6, subdivision (a). The word willfully when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. [¶] The word 'willfully' does not require any intent to violate the law, or to injure another, or to acquire an advantage." We need not decide whether defense counsel waived the issue by failing to object, because we shall hold that the court did not err in giving instructions applicable to general, not specific intent, in relation to this offense.

inference appellant invites of legislative intent to change the offense to a specific intent crime. The use of the terms willful, or willfully, in a penal statute, "usually defines a general criminal intent, absent other statutory language that requires 'an intent to do a further act or achieve a future consequence.' " (*People v. Atkins* (2001) 25 Cal.4th 76, 85.) The substitution of the word "intentional" for "willful" does not support an inference of legislative intent to change the offense from general to specific intent, because the courts have long interpreted "willful" and "intentional" to be synonymous. (See, e.g., *Hale v. Morgan* (1978) 22 Cal.3d 388, 396 [court defined "willful" or "willfully" to mean that an act of omission must occur "intentionally"] quoted with approval in *People v. Atkins, supra,* 25 Cal.4th 76, 85; accord *People v. Honig* (1996) 48 Cal.App.4th 289, 336.) The Legislature is also presumed to have had knowledge of this interpretation. (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572.)[4]

The instructions given did erroneously use the term "willfully" based on the former statutory language, instead of "intentionally." The error, however, was harmless beyond a reasonable doubt (*Pope v. Illinois* (1987) 481 U.S. 497, 502; *Rose v. Clark* (1986) 478 U.S. 570, 579) for two reasons. First, as we have explained, the term "willfully" and "intentionally," are used synonymously. Second, the court, in other instructions also defined "willfully" to mean the person committing the act did so "*intentionally*." Therefore, under the instructions given, the jury was informed that it had to find that the violation of the court order was both knowing and intentional.

CONCLUSION

The judgment is affirmed.

[4] In light of our conclusion it is unnecessary to reach appellant's assertion, in his reply brief, that the specific intent the jury should have been instructed it had to find, was an intent "to harass" Jessica. We note, however, that the word "harass" appears nowhere in the statute, and to require proof of such specific intent, in addition to a knowing and intentional violation, could undermine the security provided by a protective order by permitting a person who has knowledge of the order and who intentionally does an act in violation of the order to assert as a defense that, for example their intent was only to approach and apologize for the conduct underlying the protective order.

_____
Stein, Acting P.J.

We concur:

_____
Swager, J.

_____
Marchiano, J.